Supreme Court, U.S.
FILED
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No. 00-1080

IN THE

Supreme Court of the United States

RANDY BRITTON,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION, NEW YORK STOCK EXCHANGE, INC., NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., DONALDSON, LUFKIN & JENRETTE SECURITIES CORPORATION AND JOHN R. WILLSEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT DONALDSON, LUFKIN & JENRETTE SECURITIES CORPORATION

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QUESTION PRESENTED

Whether the lower courts correctly applied the law of New York in denying Petitioner's libel claim?

STATEMENT PURSUANT TO RULE 29.6

Respondent Donaldson, Lufkin & Jenrette Securities Corporation is a wholly-owned subsidiary of Credit Suisse First Boston (USA) Inc., which is a wholly-owned subsidiary of Credit Suisse Group, an entity that has issued equity securities that are publicly traded in Europe.

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Respondent Donaldson, Lufkin & Jenrette Securities Corporation ("DLJSC") respectfully requests that this Court deny the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.[1]

STATEMENT OF THE CASE

A. Factual Background

DLJSC is a registered broker-dealer and a member of both the National Association of Securities Dealers, Inc. (the "NASD") and the New York Stock Exchange, Inc. (the "NYSE"). As such, DLJSC is subject to regulation by the Securities and Exchange Commission (the "SEC") and by self-regulatory organizations, including the NASD and the NYSE, which are in turn also regulated by the SEC. *See* 15 U.S.C. §§ 78f(b)(1), 78s(g)(1)(A), (B).

Petitioner *pro se* Randy Britton is a graduate of the United States Military Academy and Harvard Business School, Pet. at 5, who was employed by DLJSC from May to December 1991 as an associate in the New York City office of DLJSC's Public Finance Division. Pet. App. 27a-28a, 30a.[2]

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1. In the proceedings below, DLJSC's former parent corporation, Donaldson, Lufkin & Jenrette, Inc. ("DLJ"), and DLJ's former parent corporation, The Equitable Life Assurance Society of the United States, were also named as defendants, as were several present or former officers or employees of those three entities. Of these former parties, however, the Petition names only DLJSC as a respondent before this Court.

2. Citations herein to "Pet." and "Pet. App." refer to pages in the original Petition for a Writ of Certiorari and its appendix, respectively, rather than to Petitioner's belated "corrected" Petition.

In connection with his employment by DLJSC, in August 1991 Mr. Britton completed a Form U-4, the Uniform Application for Securities Industry Registration. In response to question 22B on that form, which asks "Have you . . . ever been charged with any felony or charged with a misdemeanor specified in question A(1) or (2)?," Britton answered "no." Pet. App. 29a.

After Mr. Britton's Form U-4 was submitted, DLJSC received a notice from the NASD, Pet. App. 29a n.8, and a subsequent letter from John R. Willsen of the NYSE, transmitting the results of an FBI check of Mr. Britton's fingerprints, which reflected certain arrests on two apparent felony charges, and requesting an explanation from Mr. Britton of the circumstances surrounding those arrests.[3] Pet. App. 29a-30a.

DLJSC asked Mr. Britton to furnish the information requested by the NYSE. In a letter dated November 6, 1991 addressed to both Mr. Willsen of the NYSE and a DLJ employment officer, Mr. Britton stated that he

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3. The Securities Exchange Act of 1934 (the "Exchange Act") and regulations promulgated by the SEC thereunder impose obligations on broker-dealers to conduct investigations into the background of "associated persons." *See* 15 U.S.C. § 78q(f)(2); 17 C.F.R. § 240.17a-3(a)(12)(i)(g). Rules of both the NYSE and NASD impose similar requirements, in order to protect investors and the integrity of the securities markets. *See* NYSE Rule 345.11(a); NASD Rule 3010(e). Any member firm, or its registered or non-registered employee who "refus[es] or fail[s] . . . to furnish information to . . . the Exchange or such other self-regulatory organization, or fail[s] to take any of the foregoing actions on the date or within the time period that the Exchange requires. . . ." is subject to disciplinary sanctions. NYSE Rule 476(a)(11); *see also* NYSE Rule 476A.

"flatly refuse[d]" to furnish the information requested and that he forbade DLJ from sending any correspondence regarding him to the NYSE without his express written consent. Pet. App. 30a. Mr. Britton added that "[y]ou have hardened my resolve to defy both the NYSE and DLJ," Pet. App. 9a-10a, but closed the letter by offering an alternative, stating that "DLJ can compensate me to send a letter more to DLJ's and the NYSE's liking." *Id.*

According to the Petitioner, DLJSC subsequently learned that in addition to the arrests that had appeared on the FBI fingerprint report, he had been charged in Massachusetts with another felony, assault with a dangerous weapon, that had not been disclosed on the Form U-4. Pet. App. 11a, 31a-32a.

On December 16, 1991, DLJSC informed Mr. Britton that it was terminating his employment. Pet. App. 30a. On March 16, 1992, the parties executed a Settlement, Release, Covenant Not to Sue, Waiver, and Non-Disclosure Agreement, pursuant to which DLJSC paid Mr. Britton $150,000 "[i]n full and complete satisfaction of any and all claims against DLJ and NYSE." Pet. App. 34a. In return, Mr. Britton granted a broad release and covenant not to sue, in which Mr. Britton released DLJSC, its affiliates, officers and employees, and the NYSE, *inter alia*, "from any and all liability to him," for claims

> . . . arising in connection with his employment or separation from employment with DLJ, his application for registration with NYSE, or any and all other acts that may have violated his rights as a result of any alleged contractual relationship, whether express or implied, or any tort, or which could arise under any federal, state or local labor,

> employee benefit or fair employment practice law, or any civil rights law including, but not limited to, Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1866, the Civil Rights Act of 1991, the U.S. Constitution, the laws of the State of New York, the City of New York, or the State of Massachusetts, or any other local, state, or federal claim or any other duty or obligation of any kind or description. . . .

Pet. App. 34a-35a.

Sometime after the settlement agreement was entered into, DLJSC learned that the automated registry maintained by the NASD still showed Mr. Britton to be an employee of DLJSC. No definitive answer was apparent from NASD regulations as to whether DLJSC was required to file a Form U-5, the Uniform Termination Notice for Securities Industry Registration, in Mr. Britton's case, where he had initiated but not completed the securities industry registration process. DLJSC therefore contacted the NASD and was instructed that DLJSC was required to file a Form U-5 in such circumstances. *See* Pet. App. 8a-9a.

Having been so advised, on June 3, 1992 DLJSC electronically filed a Form U-5 with respect to Mr. Britton and sent a written copy to the NASD. Pet. App. 36a. On that form, in response to Question 12, which asked for "REASON FOR TERMINATION," DLJSC checked the box for "Other" rather than the potentially more harmful "Discharged."

In response to the form's requirement of an explanation for such an answer, DLJSC wrote: "Inability to comply with NYSE regulations." Pet App. 9a.

B. Proceedings Below

Petitioner filed the complaint *pro se* in *Britton v. Chalsty, et al.*, 93 Civ. 3746 ("*Chalsty I*") in the United States District Court for the Southern District of New York on June 3, 1993. The amended complaint was filed on September 30, 1993. In *Chalsty I*, Petitioner asserted claims against DLJSC, its parent corporations DLJ and The Equitable and various officers and employees of those three entities for fraudulent inducement into the settlement agreement, deceit, libel, breach of the settlement agreement, conspiracy, intentional and negligent infliction of emotional distress, loss of consortium (on behalf of his wife, Carolyn Britton) and rescission of the settlement agreement, and against the NYSE, Mr. Willsen of the NYSE, the NASD and the SEC for, *inter alia*, a declaratory judgment that "Inquiries in the Securities Industry about Arrests, Criminal Complaints, Criminal Informations, or Criminal Indictments are Racially Discriminatory Against Blacks."

The various defendants moved to dismiss the complaint in *Chalsty I* for failure to state a claim, except that DLJ and certain of its employees did not move to dismiss two of the claims — for libel and for breach of the settlement agreement — that were based on the filing of the Form U-5, which occurred after the date of the settlement agreement. In an order dated March 8, 1996, Pet. App. 15a, *et seq.*, United States District Judge Kimba M. Wood substantially adopted the recommendations set forth in a September 7,

1995 report and recommendation, *see* Pet. App. 25a, *et seq.*, and granted the defendants' various motions to dismiss. Petitioner moved for reconsideration of that decision, which was denied in an opinion and order dated April 15, 1997.

Following a discovery period, the remaining DLJ defendants moved for summary judgment on the two claims that had not been dismissed, for breach of the settlement agreement and libel based on the filing of the Form U-5. In an order dated February 20, 1998, *see* Pet. App. 4a, *et seq.*, Judge Wood granted that motion, adopting a report and recommendation dated September 13, 1996, *see* Pet. App. 7a, *et seq.* The district court agreed with the magistrate judge that Mr. Britton's libel claim was barred by the absolute immunity pertaining to statements on a Form U-5 as a matter of New York law. Pet. App. 5a, 9a. In addition, based on Mr. Britton's own contemporaneous letters to DLJSC and the NYSE, the district court found that no rational jury could find DLJSC's statement of the reason for Mr. Britton's separation from employment provided in that form — "Other — Inability to comply with NYSE regulations" — to be defamatory. Pet. App. 5a, 9a-10a. The district court also agreed that the filing of the Form U-5 had not been a breach of the settlement agreement as a matter of that agreement's plain and unambiguous language. Pet. App. 5a-6a. Judgment dated February 27, 1998 originally was entered in *Chalsty I* on March 2, 1998.

On February 18, 1994, seven days before their responses to the defendants' motions to dismiss were due in *Chalsty I*, Mr. Britton and his wife commenced a second action in the Southern District of New York, *Britton v. Chalsty, et al.*, 94 Civ. 1118 ("*Chlasty II*"), asserting claims of employment

discrimination and repeating many of the claims asserted in their first action. Through a series of orders, all proceedings in that action were stayed while dispositive motions were being considered in *Chalsty I*. After judgment in *Chalsty I* had been entered, defendants moved to dismiss the complaint in *Chalsty II*. In an order dated August 4, 1999, the district court dismissed Britton's claims under the doctrines of res judicata and collateral estoppel. Judgment was entered in that action on August 9, 1999.

Mr. Britton appealed to the United States Court of Appeals for the Second Circuit from the judgments entered against him in both cases. Those appeals were consolidated and, in a summary order dated June 15, 2000, the lower courts' orders were affirmed. Pet. App. 1a. Mr. Britton moved for rehearing and petitioned for rehearing *in banc*, which motion was denied on September 29, 2000.

REASONS FOR DENYING THE WRIT

The lower courts properly applied New York law in denying Petitioner's libel claim, concluding that the statement on Petitioner's Form U-5 was subject to absolute privilege from defamation claims and that, in any event, the statement was not reasonably susceptible of a defamatory meaning. Neither of these grounds for the decisions below presents an issue warranting review by this Court. *See* Sup. Ct. R. 10.

I.

THERE IS NO FEDERAL ISSUE PRESENTED

1. Petitioner concedes that his libel claim in this diversity action is governed by the substantive law of New York. Pet. at 19; *see Erie R. Co. v. Tompkins*, 304 U.S.

64, 78 (1938). Under New York law, an absolute privilege against defamation claims pertains to statements made on a Form U-5, which are considered by New York courts to be an integral step in a quasi-judicial proceeding conducted by the NYSE and other self-regulatory organizations.[4] *See Herzfeld & Stern, Inc. v. Beck*, 175 A.D.2d 689, 690-91, 572 N.Y.S.2d 683, 685 (1st Dept. 1991), *appeal dismissed*, 79 N.Y.2d 914, 581 N.Y.S.2d 666 (N.Y. 1992), *leave to appeal dismissed*, 82 N.Y.2d 789, 604 N.Y.S.2d 550 (N.Y. 1993), *and leave to appeal dismissed*, 89 N.Y.2d 1064, 659 N.Y.S.2d 848 (N.Y. 1997). The lower courts correctly applied this principle in denying Petitioner's libel claim here.

In *Herzfeld & Stern*, New York's intermediate appellate court concluded that statements on a Form U-5 fall within the absolute privilege under New York law pertaining to "statements uttered in the course of a judicial or quasi-judicial proceeding." 175 A.D.2d at 691, 572 N.Y.S.2d at 685 (citing *Wiener v. Weintraub*, 22 N.Y.2d 330, 292 N.Y.S.2d 667 (N.Y. 1968)). The court noted the established principle that the absolute privilege applicable to such proceedings "attaches not only to the hearing stage, but to every step of the proceeding in question even if it is preliminary and/or investigatory and irrespective of whether formal charges are ever presented." *Herzfeld & Stern*, 175 A.D.2d at 691, 572 N.Y.S.2d at 685 (emphasis added). The filing of Form U-5, the court reasoned, constitutes an essential step in the "comprehensive system of

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4. "Communications afforded an absolute privilege are perhaps more appropriately thought of as cloaked with an immunity, rather than a privilege against the imposition of liability in a defamation action. This absolute immunity . . . protects communications irrespective of the communicant's motives . . ." when public policy seeks to foster the communication at issue. *Toker v. Pollak*, 44 N.Y.2d 211, 219, 405 N.Y.S.2d 1, 4 (N.Y. 1978).

oversight and self-regulation by the NYSE . . . in order to ensure adherence by members of the industry to both the statutory mandates and ethical standards of the profession," *id.*, justifying application of the absolute privilege to statements contained in such forms.

The decision in *Herzfeld & Stern* has been recognized by New York courts (both state and federal) to be the "controlling" statement of New York law on the issue. *Grieve v. Barclays Capital Securities Ltd.*, No. 602820/98, 1999 WL 1680654 at *6 n.6 (N.Y. Sup. Ct. Sept. 10, 1999); *see also Culver v. Merrill Lynch & Co.*, Fed. Sec. L. Rep. (CCH), ¶ 98,811, 1995 WL 422203 at *5 (S.D.N.Y. July 17, 1995); *but see Acciardo v. Millenium Sec. Corp.*, 83 F. Supp. 2d 413, 420 (S.D.N.Y. 2000) (suggesting, in *dicta*, that *Herzfeld* conflicted with earlier Second Circuit decision in *Fahnestock & Co. v. Waltman*).[5] Under *Erie*, the decision binds federal courts in diversity cases as the definitive statement of New York law absent "persuasive evidence that the New York Court of Appeals, which has not ruled on this issue, would reach a different conclusion." *Pahuta v. Massey-Ferguson, Inc.*, 170 F.3d 125, 134 (2d Cir. 1999) (citing, *inter alia*, *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940)).

5. In *Fahnestock & Co. v. Waltman*, 935 F.2d 512 (2d Cir. 1991), *cert. denied*, 502 U.S. 492 (1991), *cert. denied*, 502 U.S. 1120 (1992), decided two months before *Herzfeld & Stern*, the Second Circuit refused to vacate an arbitration award under the "extremely limited" "manifest disregard of law" standard of review of arbitration awards under the Federal Arbitration Act, where the arbitrators had applied a qualified privilege in evaluating a Form U-5 defamation claim. *Fahnestock*, 935 F.2d at 515. Without the benefit of the *Herzfeld* decision, the court (as well as the arbitrators it was reviewing) was required to predict New York law on the issue, a prediction that would prove to be inaccurate only two months later when the *Herzfeld* decision was issued.

There is no reason to believe that the New York Court of Appeals would reach a result different from the court in *Herzfeld & Stern*. Indeed, the court had three separate opportunities to hear an appeal of that decision and in each of those instances the appeal, or the petition for leave to appeal, was dismissed.[6] Nor has any subsequent decision of a New York state court in the intervening ten years suggested that it was incorrectly decided. This is unsurprising, for *Herzfeld & Stern* and the numerous decisions that have applied it or cited it with approval, *see, e.g.*, *Culver*, 1995 WL 422203 at *5; *Grieve*, 1999 WL 1680654 at *6 n.6; *see also Dunn v. Ladenburg Thalmann & Co.*, 259 A.D.2d 544, 686 N.Y.S.2d 471, 472 (2d Dept.) (vacating arbitration award on libel claim that had been predicated on statements made in the course of NASD investigation), *leave to appeal denied*, 93 N.Y.2d 810, 694 N.Y.S.2d 632 (1999), are fully in accord with New York cases applying absolute immunity to the initiatory phase of other, sometimes less exacting, quasi-judicial proceedings. *See, e.g.*, *Wiener*, 22 N.Y.2d at 331-32, 292 N.Y.S.2d at 669 (complaint to grievance committee of bar association); *Weissman v. Mogol*, 118 Misc. 2d 911, 917-18, 462 N.Y.S.2d 383, 387-88 (N.Y. Sup. Ct. 1983) (petition to board of education complaining about teacher's performance).

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6. The decision of New York's highest court in *Toker v. Pollak*, 44 N.Y.2d 211, 405 N.Y.S.2d 1 (N.Y. 1978), relied on by Petitioner, was cited by the *Herzfeld & Stern* court in reaching its conclusion that absolute immunity applied to the statements in the Form U-5 in that case. The two decisions reflect two factual scenarios in which New York courts have drawn the line of absolute privilege differently. If, however, as Petitioner suggests, there is any tension between those two decisions, the New York Court of Appeals has declined at least those three opportunities to resolve it.

Petitioner contends that absolute privilege does not apply in his case because no investigation was commenced as a result of the filing of his Form U-5. But his suggestion that the absolute privilege attaches to statements in a Form U-5 only after a subsequent regulatory investigation has been commenced is directly contrary to New York law. As one court succinctly stated, "[i]t is of no consequence [to application of absolute privilege] that actual proceedings were never commenced by either the NASD or SEC." *Grieve*, 1999 WL 1680654 at *7 (citing *Herzfeld & Stern*, 175 A.D.2d at 691, 572 N.Y.S.2d at 685 (absolute privilege attaches "to every step of the proceeding in question even if it is preliminary . . . irrespective of whether formal charges are ever presented")). Indeed, such a rule, if it existed, would vitiate the intended benefits of the absolute privilege by conditioning the immunity of the reporting person on subsequent acts entirely out of his control.[7]

Finally, in addition to having no basis in New York law, Petitioner's assertion that absolute privilege should not apply because a Form U-5 was not required in his case is belied by both the applicable regulatory materials and by the undisputed record evidence. Both NYSE and NASD rules expressly require a Form U-5 to be filed within thirty days of the termination of any "registered" employee. *See* NYSE Rule 345.17; NASD By-laws Art. V, § 3(a). Moreover, a contemporaneous NASD Notice to Members clarifies that such a filing is required not only upon the departure of a

7. Petitioner repeatedly quotes from Judge Sack's treatise on defamation, Hon. Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* (3d ed. 1999), in his efforts to evade the clear holding of *Herzfeld & Stern*, but fails to bring to the Court's attention the fact that Judge Sack was a member of the Second Circuit panel that unanimously affirmed the lower courts' orders below. *See* Pet. App. 1a.

"registered person," but also upon "a termination or resignation by an associated person . . . ," NASD Notice to Members No. 92-19 n.2 (April 1992), which Petitioner indisputably was. In any event, as the lower courts found, the NASD eliminated any uncertainty about whether a Form U-5 was required in Petitioner's case when it directly advised DLJSC that a Form U-5 would be required under the circumstances. *See* Pet. App. 8a.

2. This Court need not reach the pure state law question of what level of privilege pertained to the Form U-5 under New York law, however, because the courts below also denied Petitioner's libel claim on an alternative ground. Based principally on Petitioner's own contemporaneous letters to both DLJSC and the NYSE, the district court concluded that no reasonable jury could find the description of the circumstances of Petitioner's departure from employment on the Form U-5 — "Inability to comply with NYSE regulations" — to be false, precluding any cause of action for libel. Pet. App. 5a, 9a-11a.

II.

THERE IS NO CONFLICT AMONG THE CIRCUITS

Petitioner's contention that the decision of the Second Circuit below is in conflict with decisions of the Sixth and Seventh Circuits of the United States Court of Appeals, *see Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132 (6th Cir. 1996); *Baravati v. Josephthal, Lyons & Ross, Inc.*, 28 F.3d 704 (7th Cir. 1994), is without merit.

Similar to the Second Circuit below, the courts in both *Baravati* and *Glennon* sought to apply the law of the forum

state in deciding whether an absolute privilege applied to statements on a Form U-5. In *Baravati*, the Seventh Circuit sought to predict how Illinois courts would decide the issue, acknowledging that there was no precedent under that state's law on the issue. 28 F.3d at 707. Similarly, in *Glennon*, the Sixth Circuit attempted to apply Tennessee law on the issue, again without the benefit of state court precedents on point.[8] 83 F.3d at 137. In both cases, the courts of appeal predicted that the state in question would apply a qualified, rather than an absolute privilege to such statements. The application of different state laws by different Circuits of the United States Court of Appeals does not raise a Circuit conflict of any form, much less the type of Circuit conflict that would merit this Court's intervention.[9] *See* Sup. Ct. R. 10(a).

Moreover, both *Baravati* and *Glennon* arose in an entirely different procedural posture than the case below. In both of those decisions, the courts of appeal were reviewing a challenge to arbitral awards under the "manifest disregard of the law" standard of review that has evolved under the Federal Arbitration Act. Given the deference to arbitration embodied in that Act, review under the "manifest

8. Indeed, the *Glennon* court expressly declined to follow *Herzfeld & Stern* "[b]ecause New York is not the proper choice of law in this case. . . ." *Glennon*, 83 F.3d at 136.

9. Moreover, the *Baravati* court observed that "the sky would not fall if the privilege were allowed to bar the kind of relief sought by Baravati," and that "denial of the privilege puts [the employer] in a hard place, where if they state a reason discreditable to the employee they may be sued for libel while if they lie about the reason they will be violating the association's rules." 28 F.3d at 708. In short, the *Baravati* court recognized the policy considerations that underlie the New York rule but decided that Illinois law would reach a different result.

disregard" standard (in those courts where that judicially-created standard is recognized, *see Baravati*, 28 F.3d at 706), is "very narrow," requiring a showing that the arbitral decision flies "in the face of clearly established legal precedent." *Glennon*, 83 F.3d at 136. Because there had been no state court decision on the issue in either Illinois or Tennessee at the time of the arbitration awards in those cases, neither award could have been reversed under this standard for applying a qualified privilege, even if the applicable state law actually would have applied an absolute privilege to statements on a Form U-5.

Unlike *Baravati* and *Glennon*, the proceedings below did not involve a challenge to an arbitration award but were instead originally brought in the district court based on diversity jurisdiction, under which the lower courts were bound to apply the law of New York, the forum state, *see Erie R. Co.*, 304 U.S. at 78, and as previously discussed, *Herzfeld & Stern* is the definitive articulation of that law.

III.

THE OTHER "QUESTIONS PRESENTED" IN THE PETITION ARE NOT PROPERLY BEFORE THIS COURT

Among its four "Questions Presented," the Petition includes two questions that are never addressed. They are:

> Does the non-conviction arrest record inquiry required by 17 C.F.R. § 240.17a-3 comply with Title VII of the Civil Rights Act of 1964 and Public Policy?

and

Are the New York Stock Exchange (NYSE) and the National Association of Securities Dealers (NASD) state actors?

Pet. at i. Because these issues have not been fairly presented in the Petition, they should not be considered by the Court. *See* Sup. Ct. R. 14(1)(a).

Even had Petitioner fairly raised those issues, however, they do not offer a basis for granting the writ in this case. As to the first question, the lower courts recognized that the claim was not actionable in these proceedings because Petitioner had failed to exhaust his administrative remedies within the SEC. Pet. App. 23a, 52a-53a.[10]

As to the second question, whether the NYSE or the NASD is a "state actor" was not preserved below and, in any event, is irrelevant to Petitioner's underlying declaratory judgment claim, which was predicated on Title VII. That enactment relates to employment discrimination by "employers," 42 U.S.C. § 2000e(b), not "state actors." *See* Pet. App. 53a-54a (September 7, 1995 report and recommendation).

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10. Had Petitioner sought a rulemaking and been denied, his recourse would have been an appeal to the appropriate Circuit of the United States Court of Appeals, which has exclusive jurisdiction over such matters, *see* 15 U.S.C. §§ 78y(a)(3), (b)(3), thus barring original proceedings in the district courts on such issues. *See Telecomms. Research & Action Center v. Federal Comms. Comm'n*, 750 F.2d 70, 75, 78-79 (D.C. Cir. 1984).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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